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Proposals and contributions received from Governments

France: elements for inclusion in the United Nations Convention against Corruption

1. The present contribution deals with some of the elements of the future convention contained in the draft resolution entitled "Terms of reference for the negotiation of an international legal instrument against corruption"[1] before the General Assembly at its fifty-sixth session. The contribution is therefore not a complete draft of the convention but essentially confines itself to the following points:

(a) Definitions;

(b) Prevention;

(c) Criminalization and sanctions.

2. The wording of several provisions takes into account the text proposed by Austria and the Netherlands (A/AC.261/IPM/4), in particular in the area of enforcement and prevention.

I. Definitions

3. With respect to definitions, France proposes the following article:

"Article (...)
"Use of terms

"For the purposes of this Convention:

"(a) 'Public official' shall mean any person holding a legislative, administrative or judicial office in a State Party, whether appointed or elected, and any person in the State Party exercising a public function, including for a public agency or public enterprise;

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"(b) 'Official of an international organization' shall mean:

"(i) Any official or other contracted employee, within the meaning of the code of conduct for public officials, of any public international, regional or supranational organization;

"(ii) Any person in the service of such an organization, whether seconded or not, who carries out functions equivalent to those performed by the officials or other servants of that organization;

"(c) 'Foreign State' shall include all levels and subdivisions of government, from national to local, and, in the case of federal States, the States and federated entities;

"(d) 'Foreign public official' shall mean any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign State, including for a public agency or public enterprise;

"(e) 'Property' shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

"(f) 'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

"(g) 'Freezing' or 'seizure' shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

"(h) 'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

"(i) 'Predicate offence' shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 13 of this Convention;

"(j) 'Controlled delivery' shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence."

Comments

4. The definition of "public official" in subparagraph (a) is modelled on the definition of "foreign public official" in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development (OECD) (the "OECD Convention").[2] That definition was found preferable to the definition contained in article 8, paragraph 4, of the United Nations Convention against Transnational Organized Crime (the "Organized Crime Convention"),[3] which refers to the domestic law of the State party, since it provides a uniform and autonomous definition of "public official" and maintains a certain symmetry with the definition of "foreign public

official". That approach should make it possible to reduce differences in application among States Parties.

5. The definition of "international civil servant" in subparagraph (b) is taken from article 9 of the Criminal Law Convention on Corruption (the "Criminal Law Convention"),[4] of the Council of Europe amended on the basis of the definition of "Community official" in article 1 of the 1997 Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.[5]

6. The definition of "foreign State" in subparagraph (c) is taken from article 1 of the OECD Convention. It has been expanded to include federal States.

7. The definition of "foreign public official" in subparagraph (d) is taken from article 1 of the OECD Convention.

II. Prevention

A. Proposed amendments

8. The proposals below supplement the proposed text submitted by Austria and the Netherlands, subject to the necessary terminological changes and without prejudice to the negotiations that will be held in the Ad Hoc Committee for the Negotiation of a Convention against Corruption.

1. Public administration

9. France considers that it would be useful to add the following two paragraphs to article 6 of the text proposed by Austria and the Netherlands:

> "2. States Parties shall take such measures as may be necessary to ensure that public officials and civil servants receive specialized, specific and appropriate training concerning the risks of corruption to which they may be exposed by virtue of their functions and the supervisory missions and investigations for which they are responsible.
>
> "3. The States Parties shall consider, while respecting the basic principles of their domestic law, taking such measures as may be necessary to adopt and implement systems for declaring the income of persons who perform specific public functions and, where appropriate, to make such declarations public."

Comments

10. Paragraph 2 supplements the other provisions of the article by including the obligation to provide training for officials exposed to the risk of corruption.

11. Paragraph 3, which invites States parties to provide for the obligation of declaring income when such a measure seems appropriate, is inspired by the Inter-American Convention against Corruption.[6]

2. Code of conduct for public officials

Article 7

12. France considers that it would be useful to supplement article 7 of the text submitted by Austria and the Netherlands with several provisions that specify the scope of the article. France proposes the addition of the following provisions:

> "0 [*To precede paragraph 1*]. States Parties shall endeavour, in particular through the preparation of adequate guidelines, to promote ethical behaviour and to foster a culture of rejection of corruption through respect for public honesty, the proper exercise of responsibilities and the development of integrity."
>
> "3 bis. Each State Party shall take such measures as may be necessary to ensure that no prejudice is caused to or sanction taken against public officials who report to the competent authorities, in good faith and on reasonable grounds, any incidents that may be considered to constitute an illegal or criminal activity, including those involving the public service."
>
> "5. For the purposes of implementing the provisions of this article, States Parties shall take account of the relevant initiatives of regional, interregional and multilateral organizations."

Comments

13. Paragraph 0 is inspired by on the Twenty Guiding Principles for the Fight against Corruption (the "Twenty Guiding Principles")[7] of the Council of Europe and contains a principle that is enlarged upon in subsequent provisions.

14. Paragraph 3 is based on article 12 the Model Code of Conduct for Public Officials[8] of the Council of Europe and reinforces the obligation to report acts of corruption, as referred to in paragraph 3 (a).

15. The wording of paragraph 5 is based on article 7, paragraph 3, of the Organized Crime Convention and refers to such regional initiatives as those of the Council of Europe.

3. Management of public administration

16. France proposes the addition of several provisions to articles 8 and 9 of the text submitted by Austria and the Netherlands.

Article 8

17. Article 8 could be supplemented as follows:

(a) The following words could be added to paragraph 2 (b): "in particular by higher administrative and financial oversight bodies";

(b) It might be useful to add the following provisions:

> "3. Each State Party shall take such measures as may be necessary to adopt and implement adequate systems for the recovery and monitoring of the income of state and public entities with a view to preventing corruption.
>
> "4. Each State Party shall take such measures as may be necessary, within the framework of its domestic law on public accounting, to prohibit the

establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents by public administrations.

"5. Each State Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions or falsifications in respect of the books, records, accounts and financial statements of administrations and public entities.

"6. Each State Party shall take such measures as may be necessary to ensure that the system of accountability of public administrations takes into consideration the consequences of acts of corruption committed by public officials."

Comments

18. Paragraph 3 is inspired by the Inter-American Convention against Corruption.

19. Paragraphs 4 and 5 are inspired by the OECD Convention and reflect the need for minimum standards in the area of public accounting.

20. Paragraph 6 is inspired by the Twenty Guiding Principles.

Article 9

21. Article 9 could be supplemented by a general paragraph inspired by the Twenty Guiding Principles, to read as follows:

"0 [*To precede paragraph 1*]. States Parties shall take such measures as may be necessary to ensure that the organization, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring, as regards access to information, as much transparency as is consistent with the need to achieve effectiveness."

4. Preventive measures in the private sector

22. France believes that the provisions of articles 11 and 12 of the text submitted by Austria and the Netherlands could be expanded.

Article 11

23. The scope of article 11, paragraph 1, could be made more precise and supplemented by provisions borrowed from the Organized Crime Convention. France therefore proposes the amendment of subparagraph (e) and the addition of subparagraph (f) below as follows:

"(e) Preventing the misuse of legal persons for committing or concealing acts of corruption by the adoption of measures concerning the identification of the constituents, holders of capital and shares, the identification of economic beneficiaries, registration obligations, advertising rules and, more generally, transparency in financial, legal and accounting transactions, inter alia, [...];

"(f) Preventing the misuse of procedures governing subsidies and licences granted by public authorities for commercial activity;"

Comments

24. Subparagraph (f) is inspired by the provisions of article 31, paragraph 2 (c), of the Organized Crime Convention. The provision concerning the transparency of legal persons has been expanded and made more precise.

Article 12

25. France proposes that article 12 be supplemented by provisions on the establishment of accounting controls, both within and outside enterprises. It proposes the following additional paragraphs:

> "3. Each State Party shall take such measures as are necessary to ensure that enterprises and commercial companies have sufficient internal accounting controls that make it possible to detect acts of corruption.
>
> "4. Each State Party shall take such measures as are necessary to ensure that accounting in enterprises and commercial companies is subjected to appropriate auditing and certification procedures, in particular by professionals or specialized enterprises approved by the public authority."

Comments

26. Paragraph 3 is inspired by the OECD Convention and the Inter-American Convention against Corruption.

27. Paragraph 4 seeks to supplement the provisions of article 12 with the obligation to provide for the auditing of the accounts of commercial enterprises.

5. Role of civil society and the media

Article 13

28. France proposes that article 13 of the text submitted by Austria and the Netherlands should be supplemented by a specific provision on freedom of the press.

29. Such a provision, based on the Twenty Guiding Principles, could be worded as follows:

> "2. States Parties shall guarantee to the media the freedom to receive, publish and disseminate information concerning cases of corruption, subject only to the limits required for the smooth operation of inquiries, with respect for the rules of conduct in force, the rights to defence and the presumption of innocence."

B. Additional provision

30. France proposes a specific provision to encourage the establishment of specialized multidisciplinary structures in the area of the prevention of corruption. Such a provision could be worded as follows:

"*Article* (...)
"*Specialized prevention structures*

"1. States Parties shall consider the establishment of specialized bodies to prevent corruption that are capable of developing multidisciplinary methods to increase knowledge about corruption and to classify acts of corruption.

"2. States Parties shall grant the specialized bodies referred to in paragraph 1 of this article independence and the material means and specialized staff, as well as the training that such staff may require to perform their functions.

"3. States Parties shall consider establishing or appointing, within their public administration, a contact point or service to which any natural or legal person may apply in order to obtain advice or to report information concerning acts of corruption."

Comments

31. This provision deals specifically with the prevention of corruption. Paragraphs 1 and 2 are based on the Twenty Guiding Principles and article 28 of the Organized Crime Convention. Paragraph 3 supplements the preceding provisions by ensuring a better flow of information.

III. Criminalization and sanctions

A. Criminalization

1. Criminalization of corruption

32. With regard to the corruption of national public officials, France is in favour of using the provisions of article 8, paragraph 1 (a) and (b), of the Organized Crime Convention as a basis for negotiations. The same constituent elements contained in those provisions could also be used with respect to the corruption of foreign public officials.

33. With regard to the corruption of international civil servants, France proposes the inclusion in the draft convention of the following article:

"*Article* (...)
"*Corruption of international civil servants and members or representatives of an international organization*

"1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in article (...) of this Convention [active corruption of a national public official], involving an international civil servant, a member of a parliamentary assembly of an international organization or holders of judicial office or officials of an international court.

"2. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in article (...) of this Convention [passive corruption of a national public official], involving an international civil servant, a member of a parliamentary assembly of an international organization of which the State Party is a member

or holders of judicial office or officials of an international court whose jurisdiction is accepted by the State Party."

Comments

34. This article is inspired by article 8, paragraph 2, of the Organized Crime Convention, but has been fundamentally amended in order to create an obligation rather than a simple option. Moreover, the text has been expanded by examples drawn from articles 10 and 11 of the Criminal Law Convention with a view to taking account of cases that would not be covered by the definition of "international civil servant".

35. Moreover, the condition relating to a State Party's membership of a parliamentary assembly or an international organization and the condition relating to the acceptance of international jurisdiction have been deleted with respect to active corruption but retained with respect to passive corruption, which makes possible a partial broadening of the scope of criminalization.

2. Criminalization of money-laundering

36. With regard to the criminalization of money-laundering, France is in favour of the wholesale incorporation of the relevant provisions of article 6 of the Organized Crime Convention. The proposal submitted by Austria and the Netherlands could therefore be supplemented by the incorporation of the provisions of article 6, paragraph 2, of that instrument.

3. Other criminalization

37. With regard to other criminalization, France proposes the incorporation into the draft convention of the following articles:

"*Article* (...)
"*Trading in influence*

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

"(a) The promising, offering or granting, directly or indirectly, of any undue advantage in order to obtain from a public official or any other person, whether or not he or she abuses his or her real or supposed influence with a view to obtaining from an administration or a public authority of the State Party any undue advantage or any favourable decision for himself or herself or for any other person;

"(b) For a public official or any other person, the soliciting or accepting, directly or indirectly, of any undue advantage for himself or herself or for another person, through the abuse of his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party any undue advantage or any favourable decision for himself or herself or for any other person, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."

Comments

38. This provision is based on article 12 of the Criminal Law Convention, with considerable changes. Criminalization, which deals both with trading in active

influence and trading in passive influence, is deliberately confined to actions committed against or for an administration or a public authority of the State party. At the present stage, trading in influence (active and passive) for a foreign public authority has not been taken into account.

"*Article* (...)
"*Misappropriation of property by a public official*

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the misappropriation or removal of any movable or immovable property, public or private funds or securities or any other object entrusted to him by virtue of his position or his mission."

Comments

39. The wording of this article is inspired by article XI of the Inter-American Convention against Corruption. Criminalization is confined to national public officials.

"*Article* (...)
"*Concealment*

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the concealment, possession or transmission of movable property or funds or the serving as an intermediary in the transmission of such property or funds, when he or she is aware that such movable property or funds are the result of one of the offences established by this Convention."

Comments

40. The criminalization of concealment is provided for in article VI, paragraph 1 (d), of the Inter-American Convention against Corruption, but the elements that constitute the crime are not mentioned. The proposed wording seeks to make criminalization more precise.

"*Article* (...)
"*Account offences*

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

"(a) Creating or using an invoice or any other accounting document or record containing false or incomplete information;

"(b) Unlawfully omitting to make a record of a payment."

Comments

41. This provision is based on article 14 of the Criminal Law Convention. However, the obligation to criminalize is not confined to acts committed with a view to committing, facilitating or concealing acts of corruption, which would limit the scope of criminalization and would raise a difficulty with respect to evidence.

"*Article* (...)

"*Complicity, instigation or attempt*

"1. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation as an accomplice or instigator in an offence established in accordance with articles (...) of this Convention.

"2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with articles (...) of this convention."

Comments

42. Paragraph 1 is inspired by article 8, paragraph 3, of the Organized Crime Convention and supplemented by wording drawn from instruments dealing with the protection of the European Communities' financial interests. The scope of this provision should cover all the offences established by the convention.

43. Paragraph 2 provides for the criminalization of attempted offences. Its scope should exclude the offences of corruption, trading in influence and concealment, owing to the particular elements that constitute such offences. It would therefore be sufficient to consider all the articles on criminalization with the exception of those which deal with the aforementioned specific offences.

B. Other sanctions

44. As regards other sanctions, all of the other penal measures should be preceded by a general provision, which could be worded as follows:

"*Article* (...)

"*Measures against corruption*

"Each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials."

Comments

45. This general provision incorporates part of article 9, paragraph 1, of the Organized Crime Convention, which has been slightly amended. Paragraph 2 has not been retained in so far as the relevant provisions could be incorporated and at the same time made more precise with respect to law enforcement agencies and prevention.

46. In addition, the proposals below should be included in the draft convention.

1. Prosecution, adjudication and sanctions

Article 20

47. On this point, France proposes the incorporation of article 20 of the proposal submitted by Austria and the Netherlands, with the addition, after paragraph 1, of a

provision to limit the scope of immunities and jurisdictional privileges. This provision could be based on the Twenty Guiding Principles and worded as follows:

"1 bis. Each State Party shall take such measures as may be necessary to limit any immunity and any jurisdictional privilege with respect to the investigation, prosecution and adjudication of offences involving corruption to what is strictly necessary for the smooth functioning of a democratic society."

2. Jurisdiction

48. With regard to the criteria for jurisdiction, France is in favour of the wholesale incorporation of the relevant provisions of the Organized Crime Convention, including the provisions of article 15, paragraph 2 (c) (ii).

Article 25

49. Moreover, article 25 of the text submitted by Austria and the Netherlands could be supplemented by a provision that allows the State party to establish its jurisdiction when the acts have been committed by one of its public officials (who are not necessarily nationals of that State) and by a provision relating to the special status of international civil servants.

50. France therefore proposes that the following provisions should be added to article 25, paragraph 2, of the text proposed by Austria and the Netherlands:

"(c) The offence involves one of its public officials or any person referred to in article 8 who is at the same time one of its nationals;

"(d) The offence is one of those established in accordance with article (...), paragraph 1 (b) (ii), of this Convention [*article 6, paragraph 1 (b) (ii) of the United Nations Convention against Transnational Organized Crime*] and is committed outside its territory with a view to the commission within its territory of an offence established in accordance with article (...), paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention [*article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of the United Nations Convention against Transnational Organized Crime*]."

Comments

51. Paragraph 2 (c) is inspired by article 17 of the Criminal Law Convention.

52. Paragraph 2 (d) incorporates the provision of article 15, paragraph 2 (c) (ii), of the Organized Crime Convention.

3. Special investigative techniques

53. France proposes the addition of a provision encouraging States Parties to implement the special investigative techniques to curb acts of corruption and other offences established by the convention.

"*Article* (...)
"*Special investigative techniques*

"1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the

use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating corruption.

"2. For the purpose of investigating the offences established by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

"3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

"4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part."

Comments

54. This article incorporates the provisions of article 20 of the Organized Crime Convention.

4. Protection of victims

55. France proposes the inclusion in the draft convention of a provision on the protection of the rights and interests of victims, which could be justified by the nature of the offences established by the future instrument and the diversity of legal systems:

"*Article* (...)
"*Protection of victims*

"1. Each State Party shall ensure that its domestic law takes account of the need to combat corruption and provides, in particular, effective remedies for persons whose rights and interests are affected by corruption in order to enable them to obtain, in accordance with the principles of its internal law, compensation for damages.

"2. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence."

Comments

56. This article is based on article 25 of the Organized Crime Convention, paragraph 1 of which has been deleted. The wording of paragraph 1 of the proposed

text is less precise than paragraph 2 of article 25 of that Convention and is inspired by the Twenty Guiding Principles.

5. Measures to enhance cooperation with law enforcement authorities

57. France is in favour of the wholesale incorporation of the relevant provisions of the Organized Crime Convention, including the provisions of article 26, paragraph 5.

Article 24

58. In addition, France considers that it would be useful to add to article 24 of the draft submitted by Austria and the Netherlands a general provision encouraging the provision of information to the law enforcement authorities established by the convention. This additional provision, which would be inserted before paragraph 1 without replacing it, could be worded as follows:

> "0 [*To precede paragraph 1*]. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established by this Convention to supply information useful to competent authorities for investigative and evidentiary purposes."

6. Final provisions

59. Without prejudice to the other final provisions of the convention, in particular the follow-up mechanism, France considers that the draft should contain a specific provision that defines the relations between the future instrument and other conventions.

60. France proposes the following text:

> "*Article* (...)
>
> "*Relationship to other agreements and arrangements*
>
> "1. This Convention shall not affect the rights and undertakings derived from international multilateral conventions.
>
> "2. States Parties to this Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.
>
> "3. If two or more States Parties have already concluded an agreement or arrangement in respect of a subject that is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or arrangement in lieu of this Convention, if it facilitates international cooperation."

Comments

61. This provision is based on article 39 of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[9] of the Council of Europe; paragraph 1 has been slightly amended. The aim of the provision is to maintain the commitments undertaken by States in other international instruments.

Notes

[1] See *Official Records of the Economic and Social Council, 2001, Supplement No. 30*, part two, chap. I, sect. A, para. 1.

[2] See *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).

[3] General Assembly resolution 55/25, annex I.

[4] Council of Europe, *European Treaty Series*, No. 173.

[5] See *Official Journal of the European Communities*, No. C 195, 25 June 1997.

[6] See E/1996/99.

[7] See Council of Europe, *Texts adopted by the Committee of Ministers of the Council of Europe, 1997*, Strasbourg, France, 1998, resolution (97) 24.

[8] See *Official Gazette of the Council of Europe: Committee of Ministers part-volume*, No. V, May 2000, recommendation R (2000) 10.

[9] Council of Europe, *European Treaty Series*, No. 141.